



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

REDACTED VERSION'

**Matter of:** Georgetown University

**File:** B-249365.2

**Date:** January 11, 1993

Wendy T. Kirby, Esq., Martin Michaelson, Esq., and Daniel C. Sweeney, Esq., Hogan & Hartson, for the protester. Rand L. Allen, Esq., Stanley R. Soya, Esq., and Phillip H. Harrington, Esq., Wiley, Rein & Fielding for the Henry M. Jackson Foundation, an interested party. James F. Trickett and Mike Colvin, Department of Health and Human Services, for the agency. C. Douglas McArthur, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protester which submitted an unacceptable initial proposal and a late best and final offer is interested party to protest the acceptability of the proposal of only remaining offeror.
2. Awardee's alternate offer which proposed a reduction in hours to perform the work from the government estimate of required hours was reasonably found acceptable where solicitation invited alternate proposals and agency found that awardee could perform work with fewer total hours.

### DECISION

Georgetown University protests the award of a contract to the Henry M. Jackson Foundation for the Advancement of Military Medicine (HMJF) under request for proposals (RFP) No. 263-92-P(AN)-0204, issued by the National Institutes of Health (NIH) for professional radiology services and other services. The protester contends that the agency failed to

The decision was issued on January 11, 1993, and contained proprietary and source-selection sensitive information. It was subject to a General Accounting Office protective order. This version of the decision has been prepared after consideration of the parties' comments identifying those portions of the decision that contained proprietary information.

hold meaningful discussions with Georgetown and that the evaluation and award decision were neither reasonable nor consistent with the factors set forth in the solicitation.

We deny the protest.

On April 2, 1992, the agency issued the solicitation for a firm, fixed-price labor hour contract to provide all necessary professional radiology services at the NIH Clinical Center for a base year and four 1-year option periods. The solicitation provided for a cost/technical tradeoff, with emphasis on technical quality and point values as follows: objective (understanding the objective of the project), 40 points; experience, 40 points, with 25 points for personnel experience and 15 points for corporate experience; price, 20 points.

As a guide for offerors in estimating the type and number of staff required to perform the radiology services, Article L.4 of the solicitation listed staffing levels and 16 labor categories from a recent sample period. These estimated staffing levels were also used for purposes of evaluating cost. The price schedule listed the 16 labor categories with estimated full-time hours for each, which when multiplied by the offeror's burdened hourly rate, produced a "not-to-exceed" total price for each category. For example, for the 16 labor categories under line items 1-5, an offeror was to provide prices for 22.9 staff members working an estimated 47,632 hours. Item 8, for positron emission tomography (PET) imaging, radio-chemistry, and cyclotron support, required an additional 6 labor categories, with 11 staff members, working an estimated 22,880 hours a year. The solicitation contained a price schedule for a total of 33.9 staff members working an estimated 70,512 hours.<sup>1</sup>

Article L.6 of the solicitation instructed offerors to complete the price schedule included in the solicitation, but encouraged them to submit alternative schedules with different proposed staffing or mixtures of labor categories. The invitation was intended to obtain proposals that might present a more economical means of satisfying the required radiology services. Offerors were also advised that in the course of performance, they might be required to acquire materials, equipment or services for which the agency would compensate them at cost plus a service fee. Article L.7

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<sup>1</sup>The solicitation also contained options for extended and additional service. Line item 6, for extended hours, listed two labor categories with 3.5 staff members and a ceiling estimated 988 hours; line item 7, for incremental options, would allow the agency to order more labor hours under any labor category up to a maximum of 650 hours per category.

also allowed offerors to submit alternate proposals deviating from the requirement, provided that the proposal did not compromise overall performance.

On May 4, 1992, the protester submitted a proposal for the services. In its proposal, the protester advised the agency of its method for estimating salary escalation during the contract period and cautioned, "any modifications to this rate resulting from action of the Board of Directors, including comparability adjustments for specific position classifications, will be implemented as of the effective date of the change with annual adjustments to the contract accordingly. This may require amended funding during the life of the contract." The protester thus did not, in its initial proposal, offer a firm, fixed labor hour rate but included a contingency for increases to be determined by its Board of Directors.

The protester also advised the agency that "the fringe benefits rate [would] vary during the life of the contracts, and the burdened hourly rate adjusted accordingly in any annual renegotiations." Further, the protester noted that it would "require reimbursement for the full cost of adequate malpractice insurance coverage, whatever this cost may be, during the life of any contract awarded" with adjustments in the burdened hourly rate "processed as an annual adjustment." The protester's proposal also provided for 12 months notice of termination for certain staff, with a minimum termination cost equivalent to 6 months of the contractual effort.

With its basic proposal, HMJF submitted an alternative price schedule, which differed from the RFP price schedule by proposing, instead of the 2,080 hours in the basic schedule, a total of 1,840 hours for a full-time equivalent (FTE), in view of solicitation instructions to exclude nonproductive (vacation, holiday, and sick leave) hours from direct labor hours. (Nonproductive hours were instead included in the burden rate applied to direct labor.) The price for this alternative schedule, including the options for extended and additional hours, totaled \$42,418,702 for the 5-year contract period. The schedule included purchase of additional equipment, in accordance with clause L.6 of the RFP, to increase efficiency, at a price of \$61,237, including service fee.

The agency found both proposals to be within the competitive range, with the two HMJF proposals receiving a slightly higher technical score. On June 8, the agency provided the protester with a written list of questions for discussion. Responding to the various conditions and contingencies in the protester's proposal, the agency advised the protester that the solicitation was for a fixed-price contract and

that salaries, fringe benefits, and rates for malpractice insurance would not be subject to adjustment. In addition, the agency insisted that in accordance with the solicitation provisions for termination for convenience, any termination costs must be limited to a contractor's reasonable costs as determined by a settlement agreement. In a telephone conversation on that date, the agency directed the protester's attentions to these concerns and the fixed-price nature of the solicitation; the protester advised the agency that if it insisted on a fixed-price format, the BAFO cost would probably be higher.

On June 10, the agency advised the protester that it would have until 3 p.m. on June 12 to respond to the agency's concerns and questions and that its best and final offer (BAFO) would be due at that time; the agency also advised the protester of its willingness to consider alternate proposals to provide the same work at a lower cost. On June 12, the protester attempted to submit a portion of its BAFO by facsimile, but failed to deliver a copy of the BAFO by the time set for receipt. The agency notified the protester by letter of June 15 that its BAFO was late and would not be considered. On June 30, 1992, the agency awarded a contract to HMJF on the basis of its lower cost alternative. This protest followed.

Initially, the agency argues that the protester is not an interested party to protest the evaluation of its own proposal, the lack of meaningful discussions, and the cost/technical tradeoff, since neither its initial proposal, which took exception to material terms of the solicitation, nor its BAFO, which was late, can be considered for award. Our regulations define an interested party entitled to pursue a protest as an "offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract;" determining whether a party is sufficiently interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Jack Young Assocs. Inc., B-243633, June 20, 1991, 91-1 CPD ¶ 585; 4 C.F.R. § 21.0(a) (1992). A party is not interested to maintain a protest if it would not be eligible for award if the protest were sustained. Moltech Corp.--Recon., B-236490.2, Dec. 6, 1989, 89-2 CPD ¶ 519.

There is no dispute that Georgetown's BAFO was late and could not be considered for award. To the extent the protester believes its technically acceptable initial offer could serve as a basis for award, the record before our Office clearly demonstrates that the protester's proposal contained price contingencies that deviated from the solicitation and rendered that proposal ineligible for

award. As stated above, the proposal contained contingencies for increases in salary, fringe benefits, and malpractice insurance premiums and, at the very least, it was unclear from the Georgetown proposal whether or not the protester was agreeing to the terms of the termination for convenience clause contained in the solicitation. Where, as here, an RFP requires fixed prices, and a proposal does not offer fixed prices, the proposal as submitted cannot be considered for award. See Sonshine Enters., B-246268, Feb. 26, 1992, 92-1 CPD ¶ 232. We thus agree with the agency that the protester submitted an unacceptable initial price proposal.

Because of its unacceptable initial offer and late BAFO, the protester would not be eligible for award regardless of its contentions concerning the technical evaluation of its proposal including the adequacy of any technical discussions conducted.<sup>2</sup> Nevertheless, we conclude that the protester is an interested party to protest the acceptability of the awardee's offer. Since there are no other eligible offerors, if the awardee's proposal is unacceptable, it would be necessary for the agency to hold a further round of discussions to cure the deficiencies in the awardee's proposal. Since Georgetown's proposal is within the competitive range, the agency would have to include Georgetown in the discussions and the protester would have the opportunity to correct the deficiencies in its proposal.

The protester contends that the agency made award to HMJF on the basis of an unacceptable alternate proposal. The protester asserts that the "alternate" proposal was no more than a price reduction obtained simply by "slashing" the number of estimated hours in the basic price schedule, containing no assurance that services could be provided in less time than the agency estimates contained in the solicitation. The protester argues that the risk of an erroneous labor hour estimate by the awardee rests squarely upon the government, which, the protester maintains, will have no choice but to purchase additional hours from HMJF at additional costs, to purchase the hours elsewhere at additional cost, or to leave its requirements unfulfilled, if the awardee cannot provide the required services within the reduced number of hours contained in its alternate proposal.

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<sup>2</sup>The record also shows that regardless of the adequacy of discussions regarding other aspects of the proposal, the agency expressly advised the protester that its price contingencies conflicted with solicitation requirements.

Initially, we note that a reduced-hour proposal was specifically invited by the RFP as amended. The record shows that prior to the receipt of initial proposals, HMJF asked whether "estimated labor hours [can] be reduced to what the contractor considers to be a FTE Man Year." This question was provided to all offerors with amendment 2 to the RFP, along with the agency's response, which directed offerors to address the 2,080 hours identified in the solicitation but invited them to submit an alternative proposal with reduced hours if the offeror believed the work could be performed with less hours.

HMJF's alternate price proposal was based upon the awardee's "review of the historic level of performance as presented in Article L.4 and . . . assessment of the staffing required." It was also based on the proposed purchase, in accordance with Article L.6, of a voice recognition system, an image transmission system, and other equipment to reduce the need for staff to be physically present at the facility for consultation; on a computerized communication system; and, in part, on staggered staffing. HMJF also proposed alternate pay classifications in three categories, which it believes will result in less expensive personnel than anticipated by the RFP. The agency found this approach to be reasonable, and noted that HMJF's technical proposal allowed cross-utilization of personnel to meet requirements and concentration of staff during patient care hours, which would reduce the number of hours needed to meet requirements.

The evaluation of proposals is a matter largely within the agency's discretion, which is in the best position to determine its needs and whether and how well an offered approach will satisfy its needs. See, e.g., RJO Enters., Inc., B-247241.2, June 4, 1992, 92-2 CPD ¶ 169. Here, we see nothing unreasonable with the agency's conclusion that HMJF can perform with fewer total hours. While the protester complains about the risk on the agency if HMJF is unable to do so, it does not point with specificity to any deficiency in the evaluation of HMJF's proposal, which was provided to counsel for Georgetown pursuant to a protective order. On this record, we find no basis for objecting to the award.

Georgetown's protest is denied.

James F. Hinchman  
General Counsel